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In The

Supreme Court of the United States

October Term, 1983

ANTHONY R. MAIORANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to a fair trial was transgressed by the introduction at trial of testimony from a government psychiatric expert that the interposing of an insanity defense, based upon a pathological gambling addiction, was legally, socially and morally repugnant.

2. Whether the Fifth Amendment right to due process was transgressed by the introduction at trial of testimony from a government psychiatric expert that the interposing of an insanity defense, based upon a pathological gambling addiction, was legally, socially and morally repugnant.

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No.

In The

Supreme Court of the United States

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ANTHONY R. MAIORANO,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DeCotiis & Philips, attorneys for petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is unreported and is contained in Appendix A, *infra* at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

STATEMENT OF THE CASE

On December 30, 1981, petitioner Anthony R. Maiorano was indicted by a grand jury alleging, in two counts, that he robbed two separate federally insured banks on October 26, 1981 and November 24, 1981, in violation of Title 18, United States Code, §2113(a). The indictment was returned approximately thirty days after the petitioner voluntarily surrendered to the Federal Bureau of Investigation. At the time of his surrender he was not a subject of the bank robbery investigations.

After the petitioner interposed an insanity defense, a jury trial in the United States District Court, District of New Jersey, consisting of three days' testimony, resulted in a verdict of guilty on both counts.

On August 11, 1982, the District Court judge sentenced the petitioner to ten years' imprisonment. The petitioner filed a notice of appeal on August 16, 1982.

On September 29, 1982, the petitioner filed an application for bail pending appeal and on October 13, 1982, the District Court judge granted that application.

The evidence adduced at trial clearly demonstrated that Anthony R. Maiorano robbed the banks in question as set forth in the indictment. The issue of his mental capacity in terms of his criminal culpability was the sole dispute at trial.

Testimony from the bank employees showed that the robberies were not performed with any threats of violence. The petitioner would simply walk up to the teller's window and demand money without either brandishing a weapon or making menacing gestures. The only arguable manifestation of possible violence was that Maiorano would approach the tellers with his hand in his pocket. Maiorano was always unarmed during the bank robberies.

Approximately one week after the last bank robbery, Maiorano voluntarily turned himself in to the Federal Bureau of Investigation and indicated that he was compelled to rob banks by virtue of his gambling addiction.

Maiorano took the stand and traced his long history of compulsive gambling back to his fifteenth birthday. He stated that as a teenager he would go so far as to steal money from his parents in order to satisfy his gambling addiction. He testified that his addiction destroyed his first marriage and invariably caused the loss of gainful employment.

After his divorce, he would then satisfy his needs for play money from his girlfriend who, in fact, did testify that he took approximately $8,000 from her. During this time period, Maiorano was compelled to rob several other banks that were not the subject of the instant indictment. Upon remarriage he was still draining his family and friends, including his new wife, of funds.

The petitioner further testified that after the bank robbery covered by Count 2 of the indictment, he confessed to the Federal Bureau of Investigation because he felt he was in need of help, and was afraid that eventually he might get hurt.

The defense called Dr. Robert T. Latimer. Dr. Latimer was a certified member of the American Board of Forensic Psychiatry and the American Board of Psychiatry and Neurology.[1]

Dr. Latimer testified that in the medical practice of psychiatry there is a mental disease or defect having to do with the inability to control gambling. He called it pathological gambling. He further testified that in making a diagnosis that an individual is a pathological gambler, a doctor looks for progressive and increasing inability, as well as a failure, to resist the overwhelming impulse to gamble. He further testified that he would look also for disruptions in the person's life as a result of the gambling.

The doctor then traced the general criteria for determining pathological gambling and then went into the examination of Maiorano for the purpose of arriving at his ultimate conclusion regarding Maiorano's mental state. The doctor interviewed Maiorano twice, interviewed his family members, and reviewed the extensive medical history of Maiorano. The doctor thought it was also clinically relevant and significant that Maiorano voluntarily confessed his criminal acts to the Federal Bureau of Investigation, thus corroborating his opinion of Maiorano's mental state at the time of the alleged crimes. He clearly opined that Maiorano committed the alleged crimes in question while he was laboring under a disease of the mind which impaired him substantially to the point where he could not conform his conduct to the requirements of the law.

The testimony of the government's psychiatrist, Dr. David Flicker, was in sharp dispute with that of Dr. Latimer. Nonetheless, Dr. Flicker acknowledged that there was a definite pattern of impulsivity. He also indicated that Maiorano showed a lack of

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1. The government waived voir dire on Dr. Latimer's qualifications.

good control of his impulses and that he showed that his feeling regarding the compulsion to gamble was associated with a thrill rather than the typical description of disorders of an impulsive type.

Dr. Flicker then testified in a manner that resembled a discourse on the legal, moral and sociological ramifications of the interposing of an insanity defense to a criminal act.

He stated:

> "I do not believe that society recognizes that the drive [the drive to rob a bank as a result of pathological gambling] would ever be that great. I don't believe society recognizes or feels that the pathological gambling is exculpatory for even the man who cheats on his income tax. We state that he gambled, didn't have the money and he cheated on his income tax. We don't feel that is an excuse to cheat on the income tax because you gamble or we don't feel it is any excuse to embezzle money from your employer or any excuse to get money in any illegal way."

In response to the question "Why doesn't that make him rob banks", the doctor stated:

> "Well, to be a compulsive gambler, you have to have money, to be sure but there are many, many ways of getting money. You work, you earn money, you can be a business man and earn money, you can get money many, many ways that are honorable and accepted. You borrow money. But if we were to state that a man who wants money can rob a bank and get money just because

> he wants to gamble, then, by a reasonable extension of that, I suppose if a man were to go out as a hit man and kill somebody for five thousand dollars because he wanted to gamble, that too would be reasonable or any other way he might get money. If he wanted to shoot all of us here and empty our pockets for the money so that he could gamble, if we accepted gambling itself as sufficient excuse, that would be it. I can't see it as a matter of law, or a matter of logic or a matter of medicine."

On cross-examination, Dr. Flicker freely acknowledged that he agreed with Dr. Latimer's diagnosis that Maiorano was a pathological gambler. Moreover, he conceded that he believed pathological gambling could never be a justification for criminal conduct.

On April 1, 1982, a jury returned a verdict of guilty on both counts. On May 4, 1982, the court sentenced Maiorano to two twenty-year consecutive sentences, along with a fine totaling $10,000, pending a temporary commitment and psychiatric evaluation by a court-appointed psychiatrist.

After the results of the psychiatric evaluation were rendered to the court, the court then imposed a sentence of ten years' imprisonment on Count 1 and a term of imprisonment of ten years as to Count 2, to run concurrently with the sentence imposed on Count 1.

Appeal was taken to the United States Court of Appeals for the Third Circuit, and on May 12, 1983 the court affirmed the conviction and sentence by way of judgment order.

REASONS FOR GRANTING THE WRIT

There have been very few instances of this Court having to review criminal convictions that concern an issue having to do with the mental capacity of an individual to violate a criminal law. Indeed, "this Court has never articulated a general constitutional doctrine of *mens rea*." *Powell v. Texas*, 392 U.S. 514, 535 (1967). *Compare, Morrissette v. United States*, 342 U.S. 246, 250 (1952) ("It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

In light of the Court's reluctance to promulgate broad principles of law regarding criminal responsibility, the particular issues arising out of insanity defenses have long been neglected. Thus, as recently as *Powell v. Texas, supra*, the observation was made that:

> "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem."

The most recent decision of this Court that deals directly with the question based upon an insanity defense is *Leland v. Oregon*, 343 U.S. 790 (1951). There, the Court established several broad principles that stand for the proposition that States have great leeway in fashioning rules concerning the interposition of an insanity defense. The Court held that States could place the burden of proving insanity beyond a reasonable doubt upon a defendant and not violate the due process clause; and held that a State is not obligated to adopt one test of insanity over another. With respect to the freedom of the States in choosing the

appropriate test of insanity, this Court noted that "questions of basic policy as to the extent to which that [scientific] knowledge should determine criminal responsibilities," are involved. *Id.* at 801.

The seminal case in this area for federal prosecutions is *Davis v. United States,* 160 U.S. 469 (1895), which was characterized in *Leland,* as establishing "no constitutional doctrine, but only the rule to be followed in federal courts", *Leland,* 343 U.S. at 797.

The District Court in *Davis* instructed the jury that the burden of proving insanity was on a defendant, and the test to determine mental capacity was that known as the McNaughten test [*McNaughten's Case,* 10 Cl. Finn. 200 (1843)]. This Court dealt with the case in terms of casting the issue as follows:

> "In other words, if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defense of insanity or if there were an entire absence of proof that he was insane." *Davis,* 160 U.S. at 479.

This Court held that an acquittal is warranted where a jury has reasonable doubt as to the mental capacity of a defendant. Significantly, Justice Harlan noted that the fundamental premise of "a will and an act" must be present to convict. Then the Court, somewhat cryptically stated:

> "The views we have expressed are supported by many adjudications that are entitled to high respect. If such were not the fact, we might have felt obliged to accept a general doctrine announced in some of the above cases; for it is desirable that

> there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty." *Davis,* 160 at 488.

This statement seems to suggest that due process considerations are called into play where inconsistency abounds in this fundamentally vital area of our criminal justice system.

Even in the late nineteenth century, the familiar cry of the misuse and abuse of the insanity defense was loud enough for this Court in *Davis* to note that this "undue stress" upon the perception that it (the insanity defense) is "frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome," *Id.* at 492-493, is misguided:

> "But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the Courts to depart from principles, fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Ibid.*

Again, this Court appeared to imply that due process is at the heart of the very availability of this defense.

The next, and truly last, case in which this Court discussed the nature of an insanity defense was *Hotema v. United States*, 186 U.S. 413 (1902). The District Court in *Hotema* instructed the jury in terms of three distinct insanity tests: the "irresistible impulse" test, the McNaughten test, and, what was later to become known as the Durham test [*Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954), overruled, *United States v. Brawner, infra*]. This Court simply held that the instruction was permissible.

By virtue of the lack of attention in this area of the federal criminal law, the Circuits Courts of Appeal have adopted a variety of tests. Currently, most Circuits have adopted what has become known as the ALI (American Law Institute) Model Penal Code Test. Section 4.01 of the Model Penal Code provides:

> "1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law, and that 2) as used in the test, the terms mental disease or defect does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct."

The Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits have adopted this test without modification. The Third Circuit has adopted a modified version of the ALI test in that the Circuit ignores the element of cognitive capacity, *i.e.*, the ability to appreciate the criminality of the conduct. *See, e.g., United States v. Kearns*, 290 F. 2d 751 (3d Cir. 1961). The status of the applicable test in the First Circuit is unclear, *e.g., Amador Beltran v. United States*, 302 F. 2d 48 (1st Cir. 1962). The Sixth Circuit has modified the ALI test and,

in fact, the Sixth Circuit has held it was plain error for the District Court to instruct the jury on the caveat paragraph (#2) of the ALI test. *United States v. Huffman,* 467 F. 2d 189 (6th Cir. 1972). Although the District of Columbia Circuit adopted the ALI test, it retained the prior controlling definition of mental disease or defect found in *Durham v. United States, supra; McDonald v. United States,* 312 F. 2d 847 (D.C. Cir. 1962). *See United States v. Brawner,* 471 F. 2d 969 (D.C. Cir. 1972). Thus, it is eminently clear that despite the prevalence of the ALI test, the administration of the criminal laws in the federal system, as to an insanity defense is in a state of affairs that does not compare with any other aspect of the federal criminal law.

It is respectfully submitted that the case at bar is the appropriate vehicle for this Court to undertake a searching analysis of the phenomenon of the insanity defense in the federal system and, at long last, give guidance to the Circuits throughout the system. The case at bar would allow this Court to analyze once and for all, the appropriate test of insanity and, furthermore, in light of the particular issue argued below, finally delineate the use and scope of expert testimony. This one single feature of the case at bar is sorely lacking in that it has been a persistent complaint, throughout the land, that the "trouble" with the insanity defense is the pyrotechnics of medical experts.

Even if the Court is not of the mind that, strictly speaking, there is no conflict in the Circuits in this area, it cannot be seriously disputed that there are a "diversity" of decisions, at least arguably in conflict, on a question of awesome importance thus bringing this matter within its review powers. *United States v. Constantine,* 296 U.S. 287 (1935).

The conviction herein, it is respectfully submitted, was a result of a tainted verdict, brought about by the unconscionable, and fundamentally unfair, testimony that essentially impugned the very

interposition of the insanity defense based upon the petitioner's undisputed compulsive, pathological gambling addiction. Petitioner respectfully asserts that this tainted evidence in effect told the jurors that they could not dare acquit the petitioner by virtue of an insanity defense according to the very facts brought before them.

Accordingly, the judgment of conviction entered below was based upon a plain and fundamental deprivation of the petitioner's right to due process of law, and a fair jury trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED C. DE COTIIS
GEORGE G. FRINO

DE COTIIS & PHILIPS
Attorneys for Petitioner

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-5501

UNITED STATES OF AMERICA

v.

MAIORANO, ANTHONY E.,

Appellant

Appeal from the United States District Court for the District of New Jersey — Newark
(D.C. Criminal No. 81-399)
District Judge: Honorable Clarkson S. Fisher

Submitted Under Third Circuit Rule 12(6)
April 26, 1983

Before HUNTER and HIGGINBOTHAM, *Circuit Judges,* and STAPLETON,* *District Judge*

After considering the contentions raised by appellant, to-wit, that the court erred:

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

1) in allowing the government's psychiatric expert to testify as to moral and sociological implications of the interposing of an insanity defense;

2) in allowing the government's mischaracterization of the appellant's medical/psychiatric expert in its summation constituted plain error in violation of the appellant's right to a free and impartial jury trial,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ James Hunter
JAMES HUNTER, III,
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, *Clerk*

Dated: May 12, 1983